Filed 1/26/10 P. v. Medina CA2/4
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE JESUS MEDINA et al., Defendants and Appellants.	B189049 (Los Angeles County Super. Ct. No. MA028151)

APPEALS from a judgment of the Superior Court of Los Angeles County, William R. Pounders, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Jose Jesus Medina.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant Raymond Vallejo.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant George J. Marron.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

This case returns to this panel following remand by the Supreme Court. In January 2006, defendants Jose Jesus Medina, Raymond Vallejo, and George J. Marron were convicted of first degree murder and attempted willful, deliberate, and premeditated murder. (Pen. Code, §§ 187, subd. (a), 664, 187, subd. (a).)[1] The jury found that during the commission of the crimes a firearm was used and intentionally discharged, and in the case of the murder, that the discharge caused great bodily injury or death to the victim. The jury also determined that the crimes were committed with the intent to benefit a criminal street gang. (§§ 12022.53, subds. (b) through (e); 186.22, subd. (b)(1).) Defendants were sentenced to the state prison for a term of 50 years to life.[2]

In July 2007, we affirmed Medina's convictions and reversed Vallejo's and Marron's convictions for insufficiency of the evidence. The Supreme Court granted the Attorney General's petition for review, vacating our opinion. In June 2009, the Supreme Court reversed our judgment and reinstated Vallejo's and Marron's convictions. (*People v. Medina* (2009) 46 Cal.4th 913.) The Supreme Court transferred the matter to this court with directions to decide issues raised in Vallejo's opening brief which were not previously addressed in our first opinion.

Defendants contend:[3] (1) the trial court erred when it denied their *Wheeler-Batson* motion;[4] (2) the trial court improperly admitted hearsay evidence; (3) the court erred when it refused to instruct the jury on self-defense as it relates to the charge of assault; (4) there is insufficient evidence to support the jury finding on the gang enhancement; and (5) the court should not have imposed sentence for the gang enhancement. Finding no error, we affirm the judgment.

---

1 All statutory references are to the Penal Code.

2 A fourth defendant, Jason Falcon, was acquitted.

3 Each defendant joined in all contentions raised by his codefendants.

4 *People v. Wheeler* (1978) 22 Cal.3d 258. *Batson v. Kentucky* (1986) 476 U.S. 79.

FACTUAL AND PROCEDURAL BACKGROUND

We take the following from the Supreme Court's opinion.

"On the evening of January 2, 2004, Manuel Ordenes and his wife Amelia Rodriguez continued their New Year's celebration with a party at their home in Lake Los Angeles, California. Their neighbors Kirk and Abraham, a friend, Lisa, and Jason Falcon were present at their house. Jose Jesus Medina ('Tiny'), George Marron, and Raymond Vallejo, self-described members of the Lil Watts gang, were also present. Although Falcon was not identified as a gang member, he was always with Medina, Marron, and Vallejo. Ordenes had formerly been a member of the Lennox gang, a Lil Watts rival, although the two gangs were not rivals in the Lake Los Angeles area. Everyone was drinking alcohol and using methamphetamine.

"Around 11:00 p.m., Ernie Barba drove to Ordenes's house with his friend, Krystal Varela, to pick up a CD. Barba went to the house, while Varela stayed at the car. When Ordenes or Rodriguez answered the door, Barba asked, 'What's up?' On direct examination, Ordenes stated he heard aggressive voices inside the house saying, 'Where are you from?' Later on cross-examination, he clarified that he heard Vallejo say, 'Who is that?' and then ask Barba, 'Where are you from?' From his experience as a former gang member, Ordenes knew that when a gang member asks another gang member 'where are you from?' he means 'what gang are you from?' a question which constitutes an 'aggression step.' He also knew that, if the inquiring gang member was an enemy, the question could lead to a fight or even death. If that gang member had a weapon, he would use it. Wanting to avoid problems in his house, and concerned that somebody was going to get killed, Ordenes ordered, 'Take that into the streets, go outside, don't disrespect the house.'

"Medina, Marron, Vallejo, and Falcon left the house and joined Barba on the front porch. Once outside, Medina, Marron, and Vallejo approached Barba and continued to ask, 'Where are you from?' Barba replied, 'Sanfer,' signifying a San Fernando Valley gang. Vallejo responded, 'Lil Watts.' Medina remarked, 'What fool, you think you

crazy?' Vallejo then punched Barba. Medina and Marron joined in the fight. According to Ordenes, Barba, even though outnumbered, defended himself well and held his own against the three attackers. All three 'couldn't get [Barba] down.' Krystal Varela confirmed that Barba was defending himself well.

"Ordenes attempted to break up the fight and pull the attackers off Barba, but Falcon held him back. Eventually, Ordenes was able to pull Barba away and escort him to his car which was parked in front of the house. Barba got into the driver's seat, while Krystal Varela got into the passenger seat. At the car, Ordenes advised Barba to leave.

"Varela heard someone in the yard say, 'get the heat,' which she understood to mean a 'gun.' Barba closed the driver's side door and drove off. As Ordenes was walking back to his house, he heard Lisa yell from the doorway, 'Stop, Tiny. No, stop.' Amelia Rodriguez then saw Medina walk into the middle of the street and shoot repeatedly at Barba's car as it drove away. Lisa, who was standing next to Rodriguez, yelled, 'Tiny, you know you're stupid. Why you doing that? There's kids here. You f'd up.' Barba died of a gunshot wound to the head." (*People v. Medina*, *supra*, 46 Cal.4th at pp. 916-917.)

"At trial, Hawthorne Police Officer Christopher Port testified as the prosecution's gang expert. Officer Port was assigned to the gang intelligence unit and was familiar with the Lil Watts gang, a violent street gang from Hawthorne. He testified that Lil Watts gang members primarily committed narcotics offenses involving possession and sales, vandalism, and gun-related crimes, including assaults with firearms and semiautomatic firearms, driveby shootings, and homicides. The police had identified defendants Medina and Vallejo as members of the Lil Watts gang, based on field contacts and their gang tattoos. The police considered Marron to be 'affiliated' with the Lil Watts gang, having seen him with Lil Watts gang members, including Medina and Vallejo.

"Officer Port testified that the Lake Los Angeles area where Ordenes lived is considered a 'transient area for gangs.' When a new gang member arrives there, he feels a need to establish himself by demanding respect, which is 'the main pride' of a gang member. Officer Port testified that gang members view behavior that disrespects their

gang as a challenge and a 'slap in the face' which must be avenged. Gang members perceive that, if no retaliatory action is taken in the face of disrespectful behavior, the challenger and others will view the gang member and the gang itself as weak. According to Officer Port, violence is used as a response to disrespectful behavior and disagreements and as a means to gain respect.

"Officer Port stated that, when a gang member asks another person, 'where are you from?' he suspects that person is in a gang and wants to know what gang he claims as his. In response to hypothetical questions, Officer Port opined that when Barba responded 'Sanfer,' he was claiming membership in that gang, and that the Lil Watts gang members had viewed Barba's response as disrespectful and had started a fight to avenge themselves. Officer Port stated that a gang member who asks that question could be armed and probably would be prepared to use violence, ranging from a fistfight to homicide. He explained, 'In the gang world problems or disagreements aren't handled like you and I would handle a disagreement. . . . When gangs have a disagreement, you can almost guarantee it's going to result in some form of violence, whether that be punching and kicking or ultimately having somebody shot and killed.'

"Ordenes testified that it is important for a gang to be respected and, above all, feared by other gangs. Once a gang is no longer feared, its members lose respect, are ridiculed, and become vulnerable and subject to attack by other gangs. He stated that death is sometimes an option exercised by gang members as a way to maintain respect. Ordenes further stated there are a lot of gang members occupying their 'turfs' with guns." (*People v. Medina*, *supra*, 46 Cal.4th at pp. 918-919.)

DISCUSSION

I. The Court Properly Denied Defendants' *Wheeler-Batson* Motion

Defendants argue the prosecutor exercised his peremptory challenges to improperly remove Hispanic jurors in violation of their right to have a jury drawn from a

cross-section of the community. They contend that the trial court erred when it failed to find a prima facie case of discrimination. We disagree.

On the fifth day of jury selection, counsel for defendant Marron stated he believed that the prosecutor was excusing jurors of a certain minority group and moved for a mistrial on the grounds of the "*Wheeler* case." The trial court set forth the basis for the motion, stating that "[the prosecutor] has excused eight jurors. I believe five of them were Hispanic." After noting that the prosecutor had accepted the jury when it had four Hispanic jurors on the panel, the court concluded, "[S]o although the percentages are high of the excusals, five out of eight, the number of Hispanics remaining on the panel does not suggest numerically that the strikes are based on race rather than other considerations, proper considerations, so I don't find a prima facie case." In explaining that there were a large number of Hispanic jurors in the pool, the court pointed out that the defense had excused a number of Hispanic jurors as well.

The prosecutor stated at that point that there were six Hispanic jurors remaining on the jury at the time of defendants' *Wheeler-Batson* motion. The court questioned whether one of the remaining jurors was Hispanic, but defendants did not. The prosecutor then asserted that he had excused only two Hispanic jurors, not five. After further discussion, during which the prosecutor faulted defendants' counsel for not raising the issue when each challenge was exercised, the court concluded the challenges against Hispanic jurors were "more than two at least."

Initially, we note that the record is not clear as to the number of Hispanic jurors the prosecutor challenged. When making a *Wheeler-Batson* motion, the party objecting to a peremptory challenge "should make as complete a record of the circumstances as is feasible." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) Here, there was a dispute in the trial court as to the ethnicity of the jurors the prosecutor challenged. The trial court settled on more than two, but not more than five. However, as the Attorney General has

chosen to accept defendants' claim that five of the excused jurors were Hispanic, we will assume that to be the case.[5]

In order to establish a prima facie case of discrimination, defendants must produce "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170.) When the trial court finds a party has "failed to make a prima facie case of group bias, the reviewing court should consider the entire record of voir dire of the challenged jurors. [Citation.] That view is consistent with the high court's recent reiteration of the applicable rules, which require the defendant to attempt to demonstrate a prima facie case of discrimination based on the 'totality of relevant facts.'" (*People v. Gray* (2005) 37 Cal.4th 168, 186, citing *Johnson v. California, supra,* 545 U.S. at p. 168.)

Defendants assert the mere fact that the prosecutor exercised five of his eight challenges against Hispanic jurors established a prima facie case of discrimination. They argue this case is similar to *People v. Huggins* (2006) 38 Cal.4th 175, 227-228, where the Supreme Court found a prima facie case had been established where the prosecutor exercised eight of 15 challenges against African-American jurors. However, as the trial court properly found, the matter is not determined simply through the use of mathematical percentages.

The court noted that the panel included a large number of Hispanic jurors. By pointing out that defense counsel had also excused Hispanic jurors, the court implied that by simple chance it was likely that an excused juror would be Hispanic. The prosecutor asserted, without objection from defendants, that at the time of his last challenge of a Hispanic juror, six others remained on the jury. When we look at the "totality of the relevant facts" (*Johnson v. California, supra,* 545 U.S. at p. 168), we conclude that the exclusion of five Hispanic jurors while leaving six Hispanic jurors on the jury does not, by itself, establish a prima facie case of discrimination. (*People v. Gray, supra,* 37

---

[5] Defendants now contend that six of the challenged jurors were Hispanic. As they failed to object to the challenge of the sixth juror in the trial court, their claim is forfeited. (*People v. Morrison* (2004) 34 Cal.4th 698, 709-710.)

Cal.4th at pp. 187-188 [insufficient showing where prosecutor excused two African-American jurors and two remained].)

Defendants contend that the fact that some Hispanic jurors remained on the jury cannot "dispel the taint of discrimination." While they are correct that a party may not necessarily prevent a finding of a prima facie case of discrimination by simply leaving a member of the protected group on the jury (*People v. Motton* (1985) 39 Cal.3d 596, 607-608), "the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection," albeit not a conclusive one. (*People v. Snow* (1987) 44 Cal.3d 216, 225.) Thus, we examine the entire record to determine whether there are race neutral grounds for the prosecutor's challenges. If so, we affirm. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.)

Interestingly enough, defendant Medina points out the race neutral reasons for the prosecutor's challenges in his opening brief. In setting forth the background of the Hispanic jurors who remained on the jury, he notes they "all had characteristics that made it quite clear they would be friendly to the prosecution." These jurors had close ties with law enforcement or had either personally been the victim of a violent crime or had a close family member who was. One juror had a friend who was killed by gang members.

In contrast, the excused jurors included one who stated that he had been "put through the drill" by police who stopped him and that the police "always" gave "lame excuses" for doing so. Another initially said he would require more than the testimony of one witness to prove any fact. This would have concerned a prosecutor who had a single eyewitness as to the identity of the shooter. One excused juror had a nephew serving a sentence in Tennessee for murder. Finally, four of the five jurors (not including the juror who required more than one witness) had either family members or friends in gangs, and seemed to be on friendly terms with the gang members. As defendant Molina observes: "It appears that in order to avoid a challenge by the prosecution, a Hispanic prospective juror had to have an 'in' with law enforcement, or have reason to have anti-gang animus." He concludes, "[t]his reflects discriminatory treatment against the protected

class." Not so. Defendants have demonstrated that the prosecutor did not exclude jurors from a protected class (all Hispanic jurors), but rather that he chose to challenge those Hispanic jurors who may have had friendly contacts with gang members or anti-police sentiment. Such jurors do not constitute a protected class.

Defendants point to the fact that the prosecutor declined to state his reasons for challenging the Hispanic jurors and argue that the "refusal would provide additional support for the inference of discrimination . . . ." (*Johnson v. California, supra*, 545 U.S. at p. 171, fn. 6.) However, as defendants admit, the Supreme Court was discussing a situation where the trial court finds a prima facie case of discrimination, and "the prosecutor declines to respond to the trial judge's inquiry regarding his justification for making a strike. . . ." (*Ibid.*) That is not the case here. The trial court found defendants had failed to establish a prima facie case. The prosecutor was not required to state his reasons for exercising the challenges in question. We do not infer anything from his silence.

Finally, defendants contend that the Hispanic jurors who were excused from the panel shared comparable characteristics with those Hispanic jurors who were allowed to remain. Citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 (*Miller-El*), they argue "that is evidence tending to prove purposeful discrimination . . . ." At the time of our original opinion, the Attorney General correctly pointed out that the type of comparative analysis contemplated by *Miller-El* does not take place until "after the trial court has found a prima facie showing of group bias, the burden has shifted to the prosecution, and the prosecutor has stated his or her reasons for the challenges in question." (*People v. Gray*, *supra*, 37 Cal.4th at p. 189.) We concluded that because the trial court failed to find a prima facie case of discrimination, defendants' argument that *Miller-El* applied was misplaced. (*People v. Bell* (2007) 40 Cal.4th 582, 601.)

We are aware that our Supreme Court has now determined that the comparative juror analysis outlined in *Miller-El* applies in California. (*People v. Lenix* (2008) 44 Cal.4th 602.) However, as the court explained, "Our holding today does not implicate claims of error at *Wheeler/Batson's* first stage. As our case law establishes, '[t]he high

court [in *Miller-El*] did not consider whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination." [Citation.] A fortiori, [*Miller-El*] does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons.'" (*People v. Lenix*, *supra*, at p. 622, fn. 15, quoting *People v. Bell*, *supra*, 40 Cal.4th at p. 601.) As noted above, the prosecutor did not give reasons for exercising his challenges and the court did not purport to ascribe any reasons for his actions. Thus, *Lenix* is of no assistance to defendants.

II. The Admission of the Evidence Relating to Gang Membership

Defendants contend the improper admission of hearsay gang evidence violated their right to confront and cross-examine witnesses as required by *Crawford v. Washington* (2004) 541 U.S. 36. Medina complains that Officer Port was allowed to testify to statements of other officers that he was a Lil Watts gang member. Vallejo points to several pieces of evidence and claims their admission should have been barred by the court. He cites: (1) Manuel Ordenes's testimony that Medina, Vallejo, and Marron told him that they were Lil Watts gang members; (2) Officer Port's testimony regarding the gang membership of John Wayne Fucci, who was convicted of one of the predicate acts necessary to prove the gang allegation; and (3) Port's testimony that he had spoken to other officers who had determined that Medina and Vallejo were members and that Marron was an associate of the Lil Watts gang. In addition, Vallejo contends Ordenes's testimony with respect to Medina's and Marron's admissions of gang membership constituted accomplice testimony received in violation of *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518.

Defendants failed to object on either ground in the trial court, and their challenges, each of which implicates the Sixth Amendment right to confrontation, are forfeited on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 424 [claim of constitutional violation forfeited where objection on that specific ground is not lodged below].)

Anticipating that this court would deem his claim forfeited, Vallejo asserts his attorney was ineffective for failing to object on constitutional grounds. He acknowledges that an ineffective assistance claim has two components. First, he must show that counsel's performance was deficient. Second, he must demonstrate that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) With respect to prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) We need not determine whether counsel rendered ineffective assistance before examining the issue of prejudice. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Id.* at p. 697.) In taking that course, we conclude that Vallejo cannot establish prejudice.

Painting with a very broad brush, Vallejo urges that "[a] large percentage of the evidence at trial was devoted to gang evidence" and concludes that "[u]nfortunately, most of that gang membership evidence was admitted despite the lack of confrontation on [defendant's] part." We are not persuaded.

Initially, Vallejo is unable to articulate precisely what fact the prosecution was able to establish with the allegedly tainted evidence that was not amply proven with admissible evidence. He suggests that "[t]he jury was shown a huge amount of evidence concluding that three of the defendants [Medina, Vallejo, and Marron] were gang members and that gang members engage in a culture unknown to the average juror, committing horrendous crimes as part of their daily activity." Assuming that was the case, there is little question that admissible, not inadmissible, evidence established those facts.

As an expert who was familiar with the Lil Watts gang, Officer Port was qualified to testify to the gang's territory, its primary activities, and the concepts of gang rivalries and gang pride. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) Vallejo does not

contend otherwise. As he concedes, it was the expert's testimony that gave the jury the basis upon which to conclude that a simple assault could reasonably lead to a homicide.

The lynchpin of the prosecution's theory was Officer Port's testimony regarding how gangs handle their disputes. The prosecutor returned to the theme of respect within the gang time after time. Port opined that the killing in this case was perpetrated with the intent to enhance the gang, and he was able to convince the jury that the simple act of asking a gang member where he was from was apt to lead to violence. Vallejo is unable to point to any aspect of Port's testimony on this subject that was inadmissible under any theory.

We turn to Vallejo's specific complaints. He alleges Port's testimony that he had spoken to officers who identified Medina and him as members and Marron as an associate of the Lil Watts gang should have been excluded. Assuming Vallejo is correct, there is no prejudice. The issue of the defendants' affiliation with the gang was never disputed. Specifically as to Vallejo, the jury heard his admission and saw a photograph that exhibited his gang tattoos. As to Medina and Marron, they made it very clear on the night of the murder that they were Lil Watts members. They admitted their membership to Ordenes and impressed upon the victim that they belonged to a rival gang. Port's brief testimony that he had spoken to other officers regarding defendants' gang membership was cumulative and its admission was harmless by any standard.

We are left with Port's reliance on other officers in concluding that John Wayne Fucci was a Lil Watts gang member when he committed one of the predicate acts necessary to prove the gang allegation. Vallejo makes no attempt to explain how the admission of this testimony was prejudicial. To the extent the testimony was necessary to prove one of the elements of the gang enhancement, the crimes of which defendants were convicted, murder and attempted murder, were sufficient to establish the gang's primary activities and Vallejo does not argue otherwise. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-323.)

With respect to his *Aranda-Bruton* claim, Vallejo asserts that the admissions of his codefendants Medina and Marron "powerfully and directly incriminated" him. We are

not persuaded. In their statements to Ordenes neither mentioned Vallejo, let alone provided evidence against him. Vallejo appears to claim that their admission that they belonged to the gang somehow allowed the jury to cast the same net around him. He ignores the fact that, as we have discussed, he placed himself in the gang net. Vallejo admitted he was a member. He also sported the gang tattoos. "To find the [*Aranda-Bruton*] error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984.) With respect to the question whether Vallejo was shown to be a Lil Watts gang member, we have no difficulty concluding that error, if any, was harmless.

Vallejo also argues that his codefendants' admissions inculpated him directly as their statements were used to establish that there was a gang motive for the crimes. We disagree. Officer Port offered his opinion that the crimes were gang-related based on gang culture and the sequence of events on the night of the murder. His testimony did not rely on any statements made by defendants other than those uttered before and during the fight with the victim, the admissibility of which Vallejo does not dispute. Inside the house, Vallejo asked the victim, "Where are you from?" After Ordenes told the combatants to take the fight outside, Vallejo, Medina, and Marron continued to press the victim for his gang identity. They asked several times, "Where are you from?" Officer Port, and to a lesser extent Ordenes, testified that it was the hurling of the gang challenge that inevitably led to the violence that ensued, as defendants felt compelled to challenge what they perceived was a lack of respect for their gang.

We conclude that any alleged *Aranda-Bruton* error was harmless beyond a reasonable doubt. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1128 [*Aranda-Bruton* error "must be scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18"].)

III. The Alleged Instructional Error

At trial, Vallejo asked that the jury be given the self-defense instruction as it applied to the target crime of assault. The trial court refused. Vallejo submits this was error.

Although a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case, it need not do so if the instruction is not supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) We conclude there was no substantial evidence in the record to support a self-defense instruction.

At the time of trial, the court utilized the CALJIC instructions. CALJIC No. 5.30, the self-defense instruction applicable here, states that a person in Vallejo's position may lawfully defend himself from attack if, "as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him."

Vallejo claims that there was an apparent existence of danger when "Barba [the victim] shouted out 'Big SanFer' at the door without other provocation. To a member of a rival gang, this is nothing less than a clarion call that violence will momentarily be present without further notice." Vallejo mischaracterizes the testimony.

All of the witnesses testified that when Barba appeared at the door, individuals inside the home yelled either "Who is it?" or, as Ordenes recalled, "Where are you from?" Ordenes testified that after Barba replied, "Sanfer," defendants got up and approached him as he stood outside. Once outside, defendants continued to ask Barba, "Where are you from?" Vallejo said, "Lil Watts," and threw the first punch, striking Barba. Vallejo, Medina, and Marron then immediately began fighting with the victim. All of the witnesses testified the three Lil Watts members attacked Barba. His reply that he was a "Sanfer" provoked hostility, not fear.

There was no evidence that Barba was in a position to inflict bodily injury upon defendants before he was attacked or that any believed he was about to do so. Put simply, this fight was like so many other gang fights. The participants announced their gang affiliations and willingly engaged in a fistfight, not out of fear, but because of a desire to uphold their respective gang's honor. If Medina, Vallejo, or Marron had

believed that Barba was about to inflict bodily injury upon him, he would not have repeated the gang challenge. He would have said nothing and stayed inside the house while the others went outside to engage the victim.

The court properly refused the self-defense instruction.

IV. There Was Sufficient Evidence of the Gang's Primary Activities

Medina asserts the evidence was insufficient to establish that the commission of the enumerated crimes in section 186.22, subdivision (e) was a primary activity of the Lil Watts gang. He complains that Officer Port merely testified that the gang primarily committed certain crimes, not that the commission of the crimes was a primary activity of the gang. His semantics-based argument is unavailing.

The Supreme Court has noted that "[s]ufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.) Keeping in mind that we must view the evidence in the light most favorable to the prosecution and affirm if any rational fact finder could conclude that the prosecution has met its burden of proof (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224), we conclude substantial evidence supports the jury finding on the enhancement.

The case upon which Medina relies, *People v. Perez* (2004) 118 Cal.App.4th 151, does not persuade us otherwise. In that case, at best, the prosecution was able to establish that Perez's gang was responsible for the commission of two shootings that occurred a week prior to the charged crimes and an attempted murder of another young man some six years earlier. The Perez court determined that was insufficient to establish the gang's primary activities were the commission of crimes enumerated in the gang statute. (*Id*. at p. 160.)

Here, although Officer Port did not offer extensive testimony on the subject, he told the jury he had investigated crimes committed by Lil Watts gang members involving drive-by shootings and homicides. When asked whether the crimes he had investigated

included assaults with firearms, he answered: "Absolutely. All sorts of gun charges, narcotics possessions, narcotic sales and the whole variety of assaults." He also testified that a Lil Watts member had been convicted of a gang-related shooting. As we noted, the jury could also consider the underlying murder and attempted murder charges in this case. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 323.) From such evidence, the jury could reasonably conclude that defendants' gang committed the statutorily enumerated crimes on a consistent and repeated, rather than sporadic, basis.

V. Sentence on the Gang Enhancement

Medina contends, and the Attorney General concedes, that the trial court could not impose sentence for the gang enhancement pursuant to section 186.22, subdivision (b) because the sentence is inapplicable to a defendant who receives a life sentence. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) While we agree with the parties, an examination of the reporter's transcript and the abstract of judgment reveals the court did not impose a sentence for the gang enhancement. Thus, no further action is necessary to correct the sentence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.